United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

74-2594

To be argued by
SHEILA GINSBERG

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

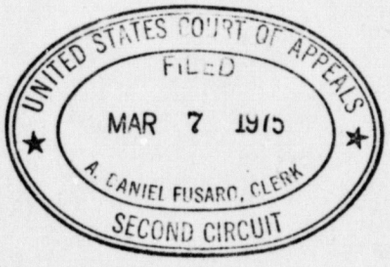
JACQUELINE DOZIER,

Appellant.

Docket No. 74-2594

SUPPLEMENTAL BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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On February 14, 1975, at the time of the filing of appellant's main brief on appeal, appellant moved for leave to file a supplemental brief on issues suggested by the record but requiring analysis of portions of the transcript which, although ordered from the court reporters, had not then been received. This Court, on February 27, 1975, granted appellant's motion, directing that any necessary supplemental brief be filed by March 7, 1975.

Review of the completed record* reveals that a supplemental brief is required to present newly discovered facts which strengthen the arguments already made and to present to the Court a third issue mandating reversal on the ground that one of the jurors was incompetent to serve.

The original transcript upon which appellant's main brief relied inaccurately indicated that only three notes were received from the jury when, in fact, there were four. Inspection of the District Court file revealed the existence of this additional note, apparently the second note received from the jury.** The note requested a reading of the testimony of both police officers, as well as that of appellant, concerning the period from the time appellant entered the police vehicle until Mary Lou arrived at the theater. This note came directly after the jurors had asked if appellant, in order to be guilty, had to know if the illegal transaction involved cocaine. Therefore, it further supports appellant's argument in Point I of the main brief, for it establishes that the conscious avoidance of knowledge charge had an effect on the jurors' final determination.

While of course error in an instruction concerning one alternative theory of guilt mandates reversal even if the record does not show that the jury actually relied on the erroneous in-

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*The last segment of the transcript was finally received by appellant on March 5, 1975.

**The missing references to this note will be certified and made part of the record on appeal.

struction (United States v. Leary, 395 U.S. 6 (1969); United States v. Rodriguez, 465 F.2d 5, 10 (2d Cir. 1972)), it is of great significance that here the record indicates that the jury in fact relied on the erroneous instruction. Bollenbach v. United States, 326 U.S. 607, 612-614 (1946).

It is clear from the second note that on the issue of knowledge the jury had decided to reject consideration of Mary Lou Dantzler's testimony. Dantzler had testified that appellant actually knew that Dantzler was selling cocaine to Bergin and Miller. If the jury had accepted this testimony, there would have been no need to request a re-reading of the officers' testimony juxtaposed against appellant's on the critical issue of knowledge.* The testimony of the police officer established, as a matter of direct evidence, only that appellant was aware of some illegality. In this context, dispositive was the twice-given erroneous instruction that appellant, although actually ignorant of the nature of the transaction, was nonetheless guilty if that ignorance persisted despite awareness of facts which should have prompted her to investigate. Although the District Court first acknowledged that it did matter whether appellant knew that the "illegal transaction" involved cocaine, the effect of the subsequent conscious avoidance charge, on these facts, was improperly to direct conviction, on a finding that appel-

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*In fact, if Dantzler's testimony had been accepted, the jury's first question about the need for appellant to know the specific nature of the illegal transaction would have been superfluous.

lant did not actually know.

Point III

THE CONVICTION MUST BE REVERSED BECAUSE, IN VIOLATION OF RULE 23(b), FEDERAL RULES OF CRIMINAL PROCEDURE, THE JUDGMENT WAS RENDERED BY A JURY OF FEWER THAN TWELVE COMPETENT JURORS.

After a day of deliberations, a fourth note from the jury was received, revealing that the jury could not reach a verdict because one of the jurors was incompetent to participate in the deliberative process. The note* stated:

> One juror feels that there is no way for any person to make a decision regarding any person's guilt. This decision is reserved to God. The juror will not discuss the case, the facts, or anything about it. Maybe you can re-direct what we must do. That we cannot avoid a decision. It is not a matter of trying to convince anyone, but a matter of no discussion.
>
> Emphasis in the original.

The Assistant United States Attorney perceived from this note that a juror with these beliefs undermined "the very heart of the process" and "indeed what the system [is] all about." Because he had "serious doubts" about this person's ability to serve as a juror, the prosecutor requested that, in the event of a mistrial, the court make certain that this juror be pre-

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*The second, third, and fourth notes are docketed as part of the record on appeal, and are annexed for the Court's convenience.

cluded from further jury service.

Although the Judge clearly agreed with the prosecutor's evaluation of this juror's incompetence to serve, commenting that it was his practice to excuse jurors who expressed such beliefs,* he nonetheless sent the jury back for further deliberations. This was error, rendering the subsequent verdict a nullity and requiring that the conviction be reversed.**

Appellant was entitled to be tried by twelve competent jurors. Rule 23(b), Fed.R.Cr.P.; Parker v. Gladden, 385 U.S. 363, 366 (1966); United States v. Ratteni, 480 F.2d 195, 198 (2d Cir. 1973).*** This final note from the jury clearly indicates that appellant was denied that right.

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*The Judge also indicated his inclination to prevent this juror's future service, and to that end would discover the juror's name by inquiring of the marshals in charge of the jury.

**Because it was revealed before the verdict that the juror was incompetent, appellant's challenge on appeal does not meet the barriers to impeachment of the jury's verdict encountered in United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974). United States v. Pleva, 66 F.2d 529 (2d Cir. 1933).

***Defense counsel's failure to move for a mistrial when the note was received cannot constitute a waiver of appellant's right to be tried by a jury of twelve competent jurors. Rule 23(b) explicitly provides that waiver of this right shall be by stipulation between the parties, in writing, and with approval of the court. See also United States v. Patton, 281 U.S. 276, 312 (1930). While it is clear that oral stipulation on the record is sufficient, it has been held that the defendant must give his express consent (United States v. Guerrero-Peralta, 446 F.2d 876 (9th Cir. 1971)), or, at the very least, that the stipulation made in his presence impliedly has his consent. United States v. Vega, 447 F.2d 698 (2d Cir. 1971); cf. Brookhart v. Janus, 384 U.S. 1 (1966).

The note establishes at its outset that one of the jurors, because of a belief in God, could not perform the functions required of him by law. The jurors' duty to apply the judge's instructions to the facts as the jury finds them is so fundamental as to be virtually co-extensive with the concept of a jury:

> It is the duty of the court to instruct the jury as to the law and it is the duty of the jury to follow the law as it is laid down by the court.
>
> United States v. Battiste, 2 Summn. 240, 243, Fed.Cas. No. 14545 (D.C.D.Mass. 1835) (Story, J.)

See also Patton v. United States, 281 U.S. 276, 288 (1930); Devitt and Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §10.15.

Further, deliberation -- consideration and examination of the reasons for and against a position -- is the essential vehicle in this process. Johnson v. Louisiana, 406 U.S. 356, 361 (1972); Williams v. Florida, 399 U.S. 78, 100 (1970); Devitt and Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS, supra, §17.05. The expressed view in the jury note, that for one of the jurors "there is no way for any person to make a decision" regarding appellant's guilt, is tantamount, as both the Judge and the prosecutor found, to a rejection of the entire process. Logically read, the assertion means more than a mere declination by the juror to participate in the final vote; rather, it is a suspension of analysis and judgment from the beginning of the

jury's consideration of the case.

In this context, the further assertion in the note that "the juror will not discuss the case, the facts, or anything about it," is only additional confirmation of the juror's incompetence to participate in the deliberations. It appears that the inability to weigh the evidence in his own mind was manifested in the juror's refusal to participate in a discussion with his fellow jurors.

Moreover, the refusal to contribute to the group analysis exascerbates the deficiencies in this jury's determinations. This is distinct, of course, from a juror's failure to articulate his viewpoints if his perspective has already been presented or if he is in agreement with what has already been said. In that instance, a further statement may not be necessary. Here, however, one juror's refusal to discuss the case with his peers because he had no viewpoint deprived appellant of her right to have twelve jurors deliberate together. Obviously, a twelfth competent juror might have concluded that appellant was innocent, and either convinced the others or adhered to his judgment so as to preclude conviction.

In any event, such conjecture is not necessary for reversal, since appellant had the right to have twelve competent jurors decide her guilt. Parker v. Gladden, supra, 385 U.S. at 365-366. Clearly a juror's incompetence to serve cannot be cured by an instruction to the jury. Certainly, the supplemental instruction given here could not have ameliorated the

deficiencies in the jury's determination of the case. In fact, it might have contributed to them. The Judge charged, in pertinent part:*

> ... I can't force anybody to act contrary to his religious beliefs in God, it's something that the Court should have known before, and I think there is a duty to make a decision, to vote one way or the other. I'm not saying that you should give up a vote that you believe in because you are in a minority, but I do say you can't simply say, I'm not going to vote.
>
> (Emphasis added).

In this context, the caveat that the recalcitrant juror need not give up a vote in which he believed is irrelevant: this particular juror had no belief at all as to guilt or innocence. Moreover, the direction to vote one way or the other, given as it was to a juror who had, according to the note, refused to consider the facts or the law or "anything about the case," approves circumvention of the necessary mental process of arriving at a verdict. Simply to vote one way or the other is not equivalent, on these facts, to making a rational judgment about appellant's guilt or innocence. Similarly, the use in the instruction of the word "decide," which in its generic sense and in ordinary circumstances might imply a direction to evaluate the facts and the law, cannot, in this case, be viewed as successfully causing the juror to deliberate. These were not ordinary circumstances: the juror, as a matter of religious

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*The entire charge is "C" to appellant's separate appendix.

conviction, could not "decide" the guilt of anyone. When faced with the dilemma of violating that conviction or, as the Judge warned him, the oath he took as a juror, he may have chosen to avoid the issue by simply casting a mindless vote with the majority. In fact, to "vote" otherwise would only have perpetuated the agony, since that would merely have engendered further discussion requiring participation in the deliberation which for several hours he had rigorously declined to do. When viewed from this perspective, coupled with the District Court's awareness of the unanimity that the other eleven jurors had achieved,* the direction to vote one way or the other in reality coerced this juror to vote with the majority. United States v. Pleva, supra, 66 F.2d 529 at 531. Because the record reveals that one of the jurors who decided this case was incompetent to do so, the conviction must be reversed.**

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*See note #3, annexed hereto.

**At minimum, the note precludes a finding by this Court that appellant was tried by twelve competent jurors, and requires at least a remand for a hearing to determine the one juror's competence to serve. United States v. Flores, 501 F.2d 1356 (2d Cir. 1974); United States v. Valot, 472 F.2d 667 (2d Cir. 1973).

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief, the judgment of the District Court must be reversed and the case remanded for a new trial.

Respectfully submitted,

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NOTES #2, #3, AND #4

FROM THE JURY TO THE COURT

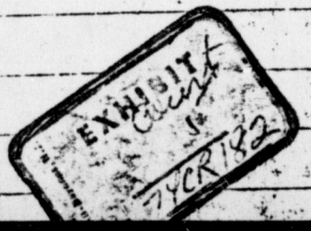
DURING DELIBERATIONS

WE WOULD LIKE TO HEAR
EACH OFFICERS TESTIMONY AS WELL
AS THE DEFENDANTS CONCERNING
THE TIME JACKIE ENTERED
THEIR VEHICLE UNTIL
MARY LOU ARRIVED AT THE
THEATER.

ONE JUROR REFUSES TO MAKE A DECISION AND THUS IT IS IMPOSSIBLE TO COME TO A UNANIMOUS VERDICT.

ALTHOUGH THE OTHER 11 WHO HAVE MADE A DECISION ARE ALL IN AGREEMENT.

ONE JUROR FEELS THAT THERE IS NO WAY FOR ANY PERSON TO MAKE A DECISION REGARDING ANY PERSON'S GUILT. THIS DECISION IS RESERVED TO GOD. THE JUROR WILL NOT DISCUSS THE CASE, THE FACTS OR ANYTHING ABOUT IT. MAYBE YOU CAN RE-DIRECT WHAT WE MUST DO, THAT WE CAN-NOT AVOID A ~~THE~~ DECISION. IT IS NOT A MATTER OF TRYING TO CONVINCE ANYONE, BUT A MATTER OF NO DISCUSSION



Certificate of Service

March 7, 1975

I certify that a copy of this supplemental brief has been delivered by messenger to the office of the United States Attorney for the Eastern District of New York.